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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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EDGAR SEMURKS and OLGA OZTURK,
individually and on behalf of others similarly situated,

Docket No.: 18-CV-4753 (BMC)

Plaintiffs,

AMENDED ANSWER

- against -

EUGENE STRASCHNOW and
TSILA POLEVETSKY,

Defendants.

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ANSWER AND DEFENSES OF DEFENDANTS

Defendant Tsila Polevetsky (“Defendant”) by her attorney, Melvin B. Berfond, Esq., hereby answers the Complaint (“Complaint”) of Plaintiffs, Edgar Semurks and Olga Ozturk (“Plaintiffs”) in the above-captioned matter as follows:

NATURE OF ACTION¹

1. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 1 of the Complaint.
2. Defendant denies the allegations contained in paragraph 2 of the Complaint.
3. Defendant denies the allegations contained in paragraph 3 of the Complaint.

¹ Defendant uses the headers from Plaintiffs' Complaint solely for ease of reference and does not admit any express or implied facts contained therein.

4. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the Complaint.

5. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 5 of the Complaint.

6. Defendant denies the allegations contained in paragraph 6 of the Complaint.

7. Defendant denies the allegations contained in paragraph 7 of the Complaint.

8. Defendant denies the allegations contained in paragraph 8 of the Complaint.

9. Defendant denies the allegations contained in paragraph 9 of the Complaint.

10. Defendant denies the allegations contained in paragraph 10 of the Complaint.

11. Defendant denies the allegations contained in paragraph 11 of the Complaint.

12. Defendant denies the allegations contained in paragraph 12 of the Complaint.

13. Defendant denies the allegations contained in paragraph 13 of the Complaint.

14. Defendant denies the allegations contained in paragraph 14 of the Complaint.

15. Defendant denies the allegations contained in paragraph 15 of the Complaint.

16. Defendant denies the allegations contained in paragraph 16 of the Complaint.

JURISDICTION AND VENUE

17. Defendant denies the allegations contained in paragraph 17 of the Complaint.

18. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Complaint.

PARTIES

19. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19 of the Complaint.

20. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of the Complaint.

21. Defendant denies the allegations contained in paragraph 21 of the Complaint.

22. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22 of the Complaint.

23. Defendant denies the allegations contained in paragraph 23 of the Complaint.

FACTUAL ALLEGATIONS

24. Defendant denies the allegations contained in paragraph 24 of the Complaint.

25. Defendant denies the allegations contained in paragraph 25 of the Complaint.

26. Defendant denies the allegations contained in paragraph 26 of the Complaint.

27. Defendant denies the allegations contained in paragraph 27 of the Complaint.

28. Defendant denies the allegations contained in paragraph 28 of the Complaint.

29. Defendant denies the allegations contained in paragraph 29 of the Complaint.

30. Defendant denies the allegations contained in paragraph 30 of the Complaint.

31. Defendant denies the allegations contained in paragraph 31 of the Complaint.

32. Defendant denies the allegations contained in paragraph 32 of the Complaint.

33. Defendant denies the allegations contained in paragraph 33 of the Complaint.

34. Defendant denies the allegations contained in paragraph 34 of the Complaint.

35. Defendant denies the allegations contained in paragraph 35 of the Complaint.

36. Defendant denies the allegations contained in paragraph 36 of the Complaint.

37. Defendant denies the allegations contained in paragraph 37 of the Complaint.

38. Defendant denies the allegations contained in paragraph 38 of the Complaint.

39. Defendant denies the allegations contained in paragraph 39 of the Complaint.

40. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 40 of the Complaint.

41. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 41 of the Complaint.

42. Defendant denies the allegations contained in paragraph 42 of the Complaint.

43. Defendant denies the allegations contained in paragraph 43 of the Complaint.

44. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 44 of the Complaint.

45. Defendant denies the allegations contained in paragraph 45 of the Complaint.

46. Defendant denies the allegations contained in paragraph 46 of the Complaint.

47. Defendant denies the allegations contained in paragraph 47 of the Complaint.

48. Defendant denies the allegations contained in paragraph 48 of the Complaint.

49. Defendant denies the allegations contained in paragraph 49 of the Complaint.

50. Defendant denies the allegations contained in paragraph 50 of the Complaint.

51. Defendant denies the allegations contained in paragraph 51 of the Complaint.

52. Defendant denies the allegations contained in paragraph 52 of the Complaint.

53. Defendant denies the allegations contained in paragraph 53 of the Complaint.

54. Defendant denies the allegations contained in paragraph 54 of the Complaint.

55. Defendant denies the allegations contained in paragraph 55 of the Complaint.

56. Defendant denies the allegations contained in paragraph 56 of the Complaint.

57. Defendant denies the allegations contained in paragraph 57 of the Complaint.

58. Defendant denies the allegations contained in paragraph 58 of the Complaint.

59. Defendant denies the allegations contained in paragraph 59 of the Complaint.

60. Defendant denies the allegations contained in paragraph 60 of the Complaint.

61. Defendant denies the allegations contained in paragraph 61 of the Complaint.

62. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 62 of the Complaint.

63. Defendant denies the allegations contained in paragraph 63 of the Complaint.

64. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 64 of the Complaint.

65. Defendant denies the allegations contained in paragraph 65 of the Complaint.

66. Defendant denies the allegations contained in paragraph 66 of the Complaint.

67. Defendant denies the allegations contained in paragraph 67 of the Complaint.

68. Defendant denies the allegations contained in paragraph 68 of the Complaint.

69. Defendant denies the allegations contained in paragraph 69 of the Complaint.

70. Defendant denies the allegations contained in paragraph 70 of the Complaint.

71. Defendant denies the allegations contained in paragraph 71 of the Complaint.

72. Defendant denies the allegations contained in paragraph 72 of the Complaint.

73. Defendant denies the allegations contained in paragraph 73 of the Complaint.

74. Defendant denies the allegations contained in paragraph 74 of the Complaint.

75. Defendant denies the allegations contained in paragraph 75 of the Complaint.

76. Defendant denies the allegations contained in paragraph 76 of the Complaint.

77. Defendant denies the allegations contained in paragraph 77 of the Complaint.

78. Defendant denies the allegations contained in paragraph 78 of the Complaint.

79. Defendant denies the allegations contained in paragraph 79 of the Complaint.

80. Defendant denies the allegations contained in paragraph 80 of the Complaint.

81. Defendant denies the allegations contained in paragraph 81 of the Complaint.

82. Defendant denies the allegations contained in paragraph 82 of the Complaint.

83. Defendant denies the allegations contained in paragraph 83 of the Complaint.

84. Defendant denies the allegations contained in paragraph 84 of the Complaint.

85. Defendant denies the allegations contained in paragraph 85 of the Complaint.

86. The allegations contained in paragraph 86 of the Complaint constitute legal conclusions, and, therefore, no response is required.

87. Defendant denies the allegations contained in paragraph 87 of the Complaint.

88. Defendant denies the allegations contained in paragraph 88 of the Complaint.

89. Defendant denies the allegations contained in paragraph 89 of the Complaint.

90. Defendant denies the allegations contained in paragraph 90 of the Complaint.

91. The allegations contained in paragraph 91 of the Complaint constitute legal conclusions, and, therefore, no response is required.

92. Defendant denies the allegations contained in paragraph 92 of the Complaint.

93. Defendant denies the allegations contained in paragraph 93 of the Complaint.

94. Defendant denies the allegations contained in paragraph 94 of the Complaint.

95. Defendant denies the allegations contained in paragraph 95 of the Complaint.

96. Defendant denies the allegations contained in paragraph 96 of the Complaint.

97. Defendant denies the allegations contained in paragraph 97 of the Complaint.

98. Defendant denies the allegations contained in paragraph 98 of the Complaint.

99. Defendant denies the allegations contained in paragraph 99 of the Complaint.

FLSA COLLECTIVE ACTION CLAIMS

100. Defendant denies the allegations contained in paragraph 100 of the Complaint.

101. Defendant denies the allegations contained in paragraph 101 of the Complaint.

102. Defendant denies the allegations contained in paragraph 102 of the Complaint.

FIRST CAUSE OF ACTION:

VIOLATION OF THE MINIMUM WAGE PROVISIONS OF THE FLSA

103. Defendant reasserts and realleges the defenses and allegations set forth above in paragraphs 1 through 102 of this Answer as if fully set forth herein.

104. Defendant denies the allegations contained in paragraph 104 of the Complaint.

105. Defendant denies the allegations contained in paragraph 105 of the Complaint.

106. Defendant denies the allegations contained in paragraph 106 of the Complaint.

107. Defendant denies the allegations contained in paragraph 107 of the Complaint.

108. Defendant denies the allegations contained in paragraph 108 of the Complaint.

109. Defendant denies the allegations contained in paragraph 109 of the Complaint.

SECOND CAUSE OF ACTION:

VIOLATION OF THE OVERTIME PROVISIONS OF THE FLSA

110. Defendant reasserts and realleges the defenses and allegations set forth above in paragraphs 1 through 109 of this Answer as if fully set forth herein.

111. Defendant denies the allegations contained in paragraph 111 of the Complaint.

112. Defendant denies the allegations contained in paragraph 112 of the Complaint.

113. Defendant denies the allegations contained in paragraph 113 of the Complaint.

THIRD CAUSE OF ACTION:

VIOLATION OF THE NEW YORK MINIMUM WAGE ACT

114. Defendant reasserts and realleges the defenses and allegations set forth above in paragraphs 1 through 113 of this Answer as if fully set forth herein.

115. Defendant denies the allegations contained in paragraph 115 of the Complaint.

116. Defendant denies the allegations contained in paragraph 116 of the Complaint.

117. Defendant denies the allegations contained in paragraph 117 of the Complaint.

118. Defendant denies the allegations contained in paragraph 118 of the Complaint.

FOURTH CAUSE OF ACTION:

**VIOLATION OF THE OVERTIME PROVISIONS OF
THE NEW YORK STATE LABOR LAW**

119. Defendant reasserts and realleges the defenses and allegations set forth above in paragraphs 1 through 118 of this Answer as if fully set forth herein.

120. Defendant denies the allegations contained in paragraph 120 of the Complaint.

121. Defendant denies the allegations contained in paragraph 121 of the Complaint.

122. Defendant denies the allegations contained in paragraph 122 of the Complaint.

FIFTH CAUSE OF ACTION:

**VIOLATION OF THE SPREAD OF HOURS WAGE ORDER
OF THE NEW YORK COMMISSIONER OF LABOR**

123. Defendant reasserts and realleges the defenses and allegations set forth above in paragraphs 1 through 122 of this Answer as if fully set forth herein.

124. Defendant denies the allegations contained in paragraph 124 of the Complaint.

125. Defendant denies the allegations contained in paragraph 125 of the Complaint.

126. Defendant denies the allegations contained in paragraph 126 of the Complaint.

SIXTH CAUSE OF ACTION:

**VIOLATION OF THE NOTICE AND RECORDKEEPING REQUIREMENTS
OF THE NEW YORK LABOR LAW**

127. Defendant reasserts and realleges the defenses and allegations set forth above in paragraphs 1 through 126 of this Answer as if fully set forth herein.

128. Defendant denies the allegations contained in paragraph 128 of the Complaint.

129. Defendant denies the allegations contained in paragraph 129 of the Complaint.

SEVENTH CAUSE OF ACTION:

**VIOLATION OF THE WAGE STATEMENT PROVISIONS
OF THE NEW YORK LABOR LAW**

130. Defendant reasserts and realleges the defenses and allegations set forth above in paragraphs 1 through 129 of this Answer as if fully set forth herein.

131. Defendant denies the allegations contained in paragraph 131 of the Complaint.

132. Defendant denies the allegations contained in paragraph 132 of the Complaint.

EIGHTH CAUSE OF ACTION:

**UNLAWFUL DEDUCTIONS FROM TIPS IN VIOLATION
OF THE NEW YORK LABOR LAW**

133. Defendant reasserts and realleges the defenses and allegations set forth above in paragraphs 1 through 132 of this Answer as if fully set forth herein.

134. Defendant denies the allegations contained in paragraph 134 of the Complaint.

135. Defendant denies the allegations contained in paragraph 135 of the Complaint.

136. Defendant denies the allegations contained in paragraph 136 of the Complaint.

137. Defendant denies the allegations contained in paragraph 137 of the Complaint.

138. Defendant denies the allegations contained in paragraph 138 of the Complaint.

AFFIRMATIVE DEFENSES

The statement of any defense or affirmative defense in this answer does not assume the burden of proof for any issue for which applicable law places the burden upon the Plaintiffs.

FIRST AFFIRMATIVE DEFENSE

The Complaint, in whole or in part, fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Complaint is barred, in whole or in part, because, at all relevant times, Defendant paid Plaintiffs all sums of money to which they were lawfully entitled.

THIRD AFFIRMATIVE DEFENSE

With respect to all matters alleged in the Complaint, Defendant at all times acted in good faith and had reasonable grounds to believe that pay practices complied with federal and state law, thus precluding any recovery by Plaintiffs. Further, Defendant acted in good faith conformity with, and reliance upon, written regulations, orders, rulings, opinions and/or interpretations of the United States Department of Labor Wage and Hour Division and/or New York State Department of Labor.

FOURTH AFFIRMATIVE DEFENSE

Plaintiff's claims are uncertain, ambiguous, and unintelligible.

FIFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred in whole or in part by the provisions of Section 4 of the Portal-to-Portal Act, 29 U.S.C. § 254, as to all hours during which Plaintiffs were engaged in activities which were preliminary or postliminary to their principal activities.

SIXTH AFFIRMATIVE DEFENSE

Defendant Tsilia Polevetsky was not an Employer of the Plaintiffs and therefore not responsible for any claims or damages, if any. .

SEVENTH AFFIRMATIVE DEFENSE

Defendant specifically denies that she acted with any willfulness, recklessness, oppression, fraud, or malice towards Plaintiff.

EIGHTH AFFIRMATIVE DEFENSE

Without conceding that any act of Defendant caused damage to Plaintiffs, Defendants is entitled to offset and recoup against any judgment that may be entered against her, any and all overpayments for wages, premiums, or other monetary compensation that Defendant may have made to Plaintiff.

NINTH AFFIRMATIVE DEFENSE

Any damages or losses that Plaintiffs incurred as a result of any act or conduct by Defendant would be speculative at best and, thus, too uncertain for recovery.

TENTH AFFIRMATIVE DEFENSE

Plaintiffs are precluded from recovery because Defendant had no actual or constructive knowledge of the conduct alleged in the Complaint.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrines of waiver, estoppel, laches, and unclean hands.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiffs are precluded from recovering attorneys' fees from Defendants under applicable provisions of law.

THIRTEENTH AFFIRMATIVE DEFENSE

Some or all of the claims in the Complaint may be subject to the *de minimis* rule, 29 C.F.R. § 785.47, because they involve insignificant amounts of overtime compensation.

FOURTEENTH AFFIRMATIVE DEFENSE

Pursuant to 29 U.S.C. § 260, Defendant is not liable for liquidated damages because the acts or omissions alleged in the Complaint were made in good faith, and Defendant had reasonable grounds for believing that the acts or omissions did not violate the Fair Labor Standards Act and/or the New York Labor Law.

FIFTEENTH AFFIRMATIVE DEFENSE

During the course of their employment, Plaintiffs never complained about any purported violations of applicable wage and hour laws, whether due to allegedly unpaid overtime wages or otherwise.

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiffs do not have any statutory or other basis for recovering damages, compensatory damages, economic damages, liquidated damages, equitable relief, attorneys' fees, interest, and/or costs of suit in this action.

SEVENTEENTH AFFIRMATIVE DEFENSE

No action or omission by Defendant was the proximate cause of any alleged injury, loss, or damage to Plaintiffs and, thus, Plaintiffs' claims should be dismissed because there

is no causal connection between the events alleged in the Complaint and any damages that Plaintiffs have allegedly suffered.

EIGHTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred, in whole or in part, by the applicable statute(s) of limitations.

NINETEENTH AFFIRMATIVE DEFENSE

Defendant, at all times, acted in good faith and in accordance with reasonable commercial standards to protect her economic interest, thus precluding any recovery by Plaintiffs.

TWENTIETH AFFIRMATIVE DEFENSE

Upon information and belief, Plaintiffs have failed, in whole or in part, to mitigate their purported damages.

TWENTY-FIRST AFFIRMATIVE DEFENSE

In addition to the foregoing defenses, Defendant reserves her right to amend her Answer to raise any and all other additional affirmative and other defenses that may become evident during discovery and during any other proceeding in this action or pursue any available counterclaims against Plaintiffs.

TWENTY-SECOND AFFIRMATIVE DEFENSE

All, or part, of the Plaintiffs' claims barred by the doctrine of res judicata.

TWENTY-THIRD AFFIRMATIVE DEFENSE

All, or part, of the Plaintiffs' claims are barred by the doctrine of issue preclusion.

TWENTY-FOURTH AFFIRMATIVE DEFENSE

This action is barred because there is another action is pending.

PRAYER FOR RELIEF

WHEREFORE, Defendant prays for relief as follows:

1. The complaint to be dismissed with prejudice.
2. That Defendant recover her costs and attorneys' fees in connection with this application.
3. Enjoining Plaintiff as a vexatious litigant from bringing similar actions without prior approval of the Court; and
4. Such other and further relief as the Court may deem just, proper and equitable.

Dated: New York, New York
October 17, 2018

Melvin B. Berfond

MELVIN B. BERFOND, ESQ. (MB-6020)

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